Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1996

KAREN L. CAMILLI,

Petitioner,

v.

INDUSTRIAL COMMISSION OF ARIZONA,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner Karen Camilli ("Camilli") operated a janitorial business named "The Final Touch." While Camilli had no workers' compensation insurance, an employee of Camilli was injured on the job. The employee filed for worker's compensation benefits. After a hearing, the Industrial Commission of Arizona found the injury was a compensable one and awarded benefits to the employee. Since Camilli had no insurance to cover the awarded benefits, the Special Fund of the Industrial Commission had to pay the benefits pursuant to Arizona law. Under Ariz. Rev. Stat. § 23-907(C), the benefits paid out by the Special Fund become a debt of the employer and act as a judgment against the employer.

Camilli filed for relief under Chapter Seven of the United States Bankruptcy Code. Because of the debt owed to the Commission, Camilli filed a Complaint to Determine Dischargeability of the Debt pursuant to 11 U.S.C. § 523(a). The Bankruptcy Court found the debt to constitute an excise tax on a transaction pursuant to 11 U.S.C. § 507(a)(8)(E) and, therefore, nondischargeable under § 523(a)(1).

On appeal to the Bankruptcy Appellate Panel for the Ninth Circuit Court of Appeals, in a divided opinion, the BAP held that the debt owed to the Industrial Commission was not an excise tax on a transaction pursuant to § 507(a)(8)(E) of the Bankruptcy Code.

QUESTION PRESENTED – Continued

The Industrial Commission appealed the majority decision of the Bankruptcy Appellate Panel to the Ninth Circuit Court of Appeals which reversed the Appellate Panel's majority decision.

The question presented is: Does the debt owed to the Industrial Commission for uninsured workers' compensation benefits constitute an excise tax on a transaction under 11 U.S.C. § 507(a)(8)(E)?

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PETITION FOR WRIT OF CERTIORARI

Karen Camilli ("Camilli") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit Court of Appeals reached this proceeding on September 5, 1996, to resolve the conflict between the Sixth and Ninth Circuit Courts of Appeal on the important issue presented herein.

OPINIONS BELOW

The opinion of the BAP was published as *In re Camilli*, 182 B.R. 247 (9th Cir. BAP 1995) and is attached as Appendix B (App. 14-31). The opinion of the United States Court of Appeals for the Ninth Circuit that gives rise to this Petition was published at 94 F.3d 1330 (9th Cir. 1996) and is attached as Appendix A (App. 1-13).

JURISDICTION

On November 12, 1993, in an adversary proceeding in Camilli's Chapter 7 bankruptcy case, the Bankruptcy Court for the District of Arizona issued a memorandum decision in which it held that the debt owed by Camilli to the Commission constituted an excise tax. On December 9, 1993, the order of the Bankruptcy Court was reduced to final judgment. Camilli timely appealed the decision to the Bankruptcy Appellate Panel for the Ninth Circuit Court of Appeals.

The Bankruptcy Appellate Panel, in a 2-1 decision, reversed the Bankruptcy Court's decision on April 27, 1995. The Commission timely appealed the BAP's decision to the Ninth Circuit Court of Appeals.

The Ninth Circuit Court of Appeals reversed and remanded the BAP's decision in an opinion which was filed on September 5, 1996. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the decision of the Court of Appeals.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THE CASE

Arizona Revised Statutes § 23-907(C) provides:

> C. The employer shall be notified of his liability to the special fund periodically and this notice shall include a ten per cent penalty of the amount expended by the special fund or a penalty of five hundred dollars, whichever is greater, plus interest on the amount expended and the penalty pursuant to § 44-1201. The payments made from the special fund pursuant to the award plus the penalty shall act as a judgment against the employer. The commission shall file the award in the office of the clerk of the superior court in any county in the state and such award shall be entered in the civil order book and judgment docket and when so filed and entered shall be a lien for eight years from the date of the award upon the property of the employer located in the county. Execution may issue thereon within eight years in the same

manner and with like effect as if the award were a judgment of the superior court. The commission may recover reasonable attorney fees incurred pursuant to this section. Any recovery pursuant to this section shall be deposited in the special fund account.

Section 523(a)(1) of the United States Bankruptcy Code, Title 11, provides in pertinent part:

> (a) A discharge under section 727 . . . does not discharge an individual debtor from any debt –
>
> (1) for a tax or a customs duty –
>
> (A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(8) of this title . . . .

Section 507(a)(8)(E) of the Bankruptcy Code provides in relevant part:

> (a) The following expenses and claims have priority in the following order:
>
> (8) Eighth, allowed unsecured claims of governmental entities; only to the extent that such claims are for –
>
> (E) an excise tax on –
>
> (ii) if a return is not required, a transaction occurring during the three years immediately preceding the date of the filing of the petition . . . .

STATEMENT OF THE CASE

This case involves the treatment of a claim of the Special Fund of the Industrial Commission of the State of Arizona (hereinafter referred to as the "Commission"). The Commission paid out workers' compensation benefits to an injured employee of Karen Camilli (hereinafter referred to as "Camilli") after the employee was injured during a time in which Camilli had no workers' compensation insurance coverage. The uninsured injury award injury became a debt owed by Camilli to the Commission under Arizona law for the benefits paid out.

On December 10, 1992, Camilli filed a petition for relief under Chapter 7, Title 11, United States Code. Because of the debt owed to the Commission for the uninsured workers' compensation award, Camilli filed a Complaint to Determine Dischargeability of the Debt to seek a determination that the debt was dischargeable under 11 U.S.C. § 523(a)(1). Section 523(a)(1) provides that certain taxes entitled to priority status under Section 507(a) are not dischargeable. Specifically, in this case the particular provision is Section 507(a)(8)(E) which provides for priority treatment for excise taxes on a transaction occurring during the three years immediately preceding the date of the filing of the petition.

The Bankruptcy Court issued a memorandum decision which held that the debt to the Commission was covered by § 507(a)(8)(E) and, therefore, nondischargeable under § 523(a)(1).

Camilli appealed the decision to the Bankruptcy Appellate Panel for the Ninth Circuit Court of Appeals. In a published majority decision, the BAP found the debt

to possess more nontax characteristics than tax characteristics and, therefore, not to be an excise tax covered by § 507(a)(8)(E).

The Commission appealed the majority BAP decision to the Ninth Circuit Court of Appeals which reversed the lower court in a published decision.

Camilli seeks review of the decision of the Ninth Circuit Court of Appeals.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's Opinion Directly Conflicts With The Sixth Circuit's Ruling In *Suburban* And Is Contrary To The Language And Legislative History Of § 507(a)(8)(E).

The decision below is in direct conflict with the Sixth Circuit Court of Appeal's decision in *In re Suburban Motor Freight, Inc.*, 36 F.3d 484 (6th Cir. 1994) (hereinafter "Suburban"). Certiorari is appropriate here.

The Sixth Circuit in *Suburban* held that the liability of the Debtor-Employer was not an excise tax on a transaction under 11 U.S.C. § 507(a)(8)(E). In *Suburban*, the Court of Appeals concluded that "the non-tax characteristics of Suburban's liability for reimbursement for claims payments predominate over its tax characteristics, and the Bureau's [State of Ohio's] claim more closely resembles a subrogation claim than a universally applicable tax." *Id.* at 489.

In direct contrast, the decision of the Ninth Circuit Court of Appeals in this case held that the claim of the

Commission for payments for an uninsured award of compensation benefits constitutes an excise tax on a transaction under § 507(a)(8)(E). *In re Camilli*, 94 F.3d 1330 (9th Cir. 1996). The Ninth Circuit reversed the decision of the Bankruptcy Appellate Panel which had concurred with the Sixth Circuit and in which the BAP stated, "We find the Sixth Circuit's approach sound in refusing to elevate what is essentially an insurance subrogation claim to tax priority status." *In re Camilli*, 182 B.R. 247, 251 (9th Cir. BAP 1995); App. B-22,23.

The Ninth Circuit's decision ignores the plain language of the statute which covers excise taxes on transactions. The debt is not an excise tax nor is there a transaction involved. Moreover, the Ninth Circuit's decision ignores the legislative history of § 507(a)(8)(E) which Congress drafted to cover "sales taxes, estate and gift taxes, gasoline and special fuel taxes, and wagering and truck taxes." 124 Cong.Rec. H11113 (daily ed. Sept. 28, 1978); S17430 (daily ed. Oct. 6, 1978). The effect of the Ninth Circuit's decision is to elevate any statutorily created business debts owed to a state or governmental entity to priority status.

The Ninth Circuit's decision ignores long-standing rulings on what constitutes a tax such as in the *Head Money Cases* (*Edye v. Robertson*), 112 U.S. 580, 5 S.Ct. 247, 28 L.Ed. 798 (1884). The Ninth Circuit's decision in this case ignores factors used by the Supreme Court in the *Head Money Cases* such as whether the money is used for general support of the government, and principal use of the funds being to regulate rather than to raise revenues. None of these factors are present in the instant case.

The conflict is clear and irreconciliable. Certiorari is appropriate.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: KAREN LEE CAMILLI, *Debtor.*	No. 95-15928
INDUSTRIAL COMMISSION OF ARIZONA, *Appellant,* v. KAREN LEE CAMILLI, *Appellee.*	BAP No. AZ-93-02437-JmR OPINION

Appeal from the Ninth Circuit
Bankruptcy Appellate Panel
Russell, Meyers, and Jones, Judges, Presiding

Argued and Submitted
June 10, 1996 – San Francisco, California

Filed September 5, 1996

Before: Procter Hug, Jr., Chief Judge, Mary M. Schroeder and Michael Daly Hawkins, Circuit Judges.

Opinion by Judge Schroeder

COUNSEL

Lawrence D. Hirsch, Hirsch Law Office, Phoenix, Arizona, for the appellant.

Russell A. Brown, Brown & Sunkin, Chandler, Arizona, for the appellee.

OPINION

SCHROEDER, Circuit Judge:

The United States Bankruptcy Code establishes a priority for nondischargeable obligations owed by a debtor to a state that are in the nature of an "excise tax." 11 U.S.C. § 507(a)(8)(E). The statute in relevant part provides:

> (a) The following expenses and claims have priority in the following order:
>
> . . .
>
> (8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for –
>
> . . .
>
> (E) an excise tax on –
>
> (ii) . . . a transaction occurring during the three years immediately preceding the date of the filing of the petition. . . .

11 U.S.C. § 507(a)(8)(E)(ii).

This case concerns a statutorily-imposed obligation of the debtor, Karen Camilli, to the Industrial Commission of Arizona (ICA) for workers' compensation benefits the Commission had to pay to one of Camilli's employees who was injured on the job. The ICA's obligation arose because Camilli had failed to obtain workers' compensation insurance in violation of state law. The sole issue is whether Camilli's debt to the ICA is a "tax" within the meaning of the Bankruptcy Code, and therefore nondischargeable.

A divided Bankruptcy Appellate Panel ("BAP") held that the obligation was not a "tax" but was instead a "fee" that was to be treated as any other dischargeable, unsecured debt. *In re Camilli*, 182 B.R. 247 (9th Cir. BAP 1995). The BAP majority decision reversed the decision of the Bankruptcy Court that had held the obligation non-dischargeable as a tax.

The federal bankruptcy statutes do not define "tax," but the Supreme Court has made it clear that labels imposed by state law are not controlling. Rather, the Supreme Court has stated that taxes are "pecuniary burdens laid upon individuals or their property, regardless of their consent, for the purpose of defraying the expenses of government or of undertakings authorized by it." *New York v. Feiring*, 313 U.S. 283, 285 (1941).

The leading case in this circuit is *In re Lorber Industries of California*, 675 F.2d 1062 (9th Cir. 1982), which refined that general principle by holding that to qualify as a tax, a debt must be (1) an involuntary pecuniary burden; (2) imposed by the state legislature; (3) for a public purpose; (4) under the police or taxing power. *Id.*, 675 F.2d at 1066. We dealt in *Lorber* with charges imposed for the individual use of a city's sewer system to dispose of hazardous waste materials. The sewer system, with its concomitant charges, was one of the options available to entities wishing to dispose of waste materials lawfully, and users received a permit to use the sewer services in return for paying the charges. We characterized the obligation in *Lorber* as more akin to a contractual obligation, voluntarily incurred by the debtor, than to an "involuntary pecuniary burden" characteristic of a tax. *Id.*, 675 F.2d at 1067, n. 4.

In this case the debtor violated state law by failing to obtain workers' compensation insurance for her employees. Under Arizona law, such violation could not operate to deprive an employee of workers' compensation benefits. Thus, when one of Camilli's employees was injured at work, Arizona law required the statutorily-established Special Fund to pay the benefits and obtain a judgment lien on behalf of the ICA against the employer for recoupment. A.R.S. §§ 23-907, 23-1065.

In deciding whether such an obligation is a non-dischargeable tax, or whether it is more in the nature of a contractual debt like the fee assessment in *Lorber*, a key consideration for the BAP was whether the obligation was voluntarily undertaken. The BAP majority concluded that the obligation was a voluntary one akin to acceptance of a contractual fee obligation, because in its view, Camilli made a "voluntary" decision to violate state law when she failed to insure her employees. Because we conclude that an obligation imposed by statute as a result of a violation of state law cannot, under the principles enunciated in *Lorber* and nearly universally accepted, constitute a contractual debt, we conclude that the BAP erred in reversing the Bankruptcy Court.

The BAP also rested its decision on the additional assumption that the Special Fund, which was owed reimbursement as a result of its own statutory obligation to pay benefits for defaulting employers, was in a position materially similar to private insurance carriers who may be owed unpaid premiums by employers in bankruptcy proceedings. The BAP majority decided that giving the obligation owed to the ICA a nondischargeable priority would discriminate against similarly situated private

creditors. *See In re Suburban Motor Freight, Inc.*, 36 F.3d 404 (6th Cir. 1994) (*Suburban II*). We conclude, however, that private carriers who are owed premiums established in insurance contracts are not similarly situated to the ICA's Special Fund because the Fund carries a unique burden imposed by the legislature in the exercise of its police power to protect employees injured on the job.

In order to provide a full understanding of the reasons for our decision, we first explain in some detail the operation of the Arizona workers' compensation system, and we then survey the legal authority dealing with similar issues concerning what is a "tax" under the Federal Bankruptcy Code.

THE ARIZONA WORKERS' COMPENSATION SYSTEM

Fulfilling a mandate in the Arizona Constitution, Ariz. Const. Art. 18, § 8, the state legislature enacted a comprehensive workers' compensation scheme, codified at A.R.S. § 23-901 et seq. Employers must insure their workers against job-related injury or they risk civil and criminal sanctions. A.R.S. § 23-907.

Employers may buy workers' compensation insurance from the state or from authorized private providers or, by proving to the ICA their ability to pay timely compensation directly to their injured employees and by posting a substantial bond, they may self-insure. A.R.S. § 23-961. An employee's agreement to waive workers' compensation is generally void. A.R.S. § 23-1025.

Employees may trade workers' compensation coverage for the right to sue the employer. This election is

made by affirmatively rejecting the provisions of the Workers' Compensation Law in writing. Ariz. Const. Art. 18 § 8; A.R.S. § 23-906. Employees who do not formally reject the Law's protections are conclusively presumed to have accepted them and to have disclaimed the right to sue for injuries resulting from negligence. A.R.S. § 23-906.

To ensure compensation for injured workers whose employers have failed to insure them, but who elect not to sue, the legislature established a Special Fund. A.R.S. § 23-1065.[1] The Special Fund, maintained by tax revenues, is administered by the ICA. A.R.S. § 23-1065. Payments to an injured employee from the Special Fund "act as a judgment against the employer." A.R.S. § 23-907. And "[j]udgments obtained in any action prosecuted by the [ICA] . . . under the authority of [the Workers' Compensation Law] . . . have the same priority against the assets of the employer as claims for taxes." A.R.S. § 23-933.

The Special Fund is maintained in part by a tax on all unemployment insurance premiums paid in Arizona, whether to the state or to a private insurer. A.R.S. § 23-1065. In addition, employers who qualify to self-insure pay into the Fund according to a formula. *Id.* Also helping maintain the Special Fund are sums the ICA recoups in actions like this one.

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[1] The Special Fund is different and separate from the State Compensation Fund, from which benefits are paid to injured workers whose employers have elected to purchase insurance from the state.

PROCEDURAL HISTORY

Karen Camilli failed to insure employees of her now-defunct janitorial business, "Final Touch." After one of Camilli's staff, Barbara Kennedy, was injured at work in November 1989, Kennedy filed a claim for compensation with the ICA. The ICA paid Kennedy and obtained a judgment against Camilli pursuant to A.R.S. section 23-907.

When Camilli filed for bankruptcy in 1991, the ICA filed an objection to her Chapter 13 Plan, and sought priority status for its judgment against her. After Camilli's Chapter 13 petition was dismissed and a subsequent Chapter 7 petition filed, she filed a complaint to determine the dischargeability of her debt to the ICA pursuant to 11 U.S.C. § 523(a)(1). The ICA filed a timely answer, and the bankruptcy court ruled that the principal amount paid out of the Special Fund was an "excise tax" within the meaning of 11 U.S.C. § 507(a)(8)(E), and therefore not dischargeable in bankruptcy.

Camilli appealed, and the BAP reversed, holding that the debt was not a tax, which is in the nature of an assessment, because this debt resulted from "Camilli's voluntary decision not to provide insurance." *In re Camilli*, 182 B.R. at 251. According to the BAP, the ICA's claim stemmed from its "implied voluntary contract with Camilli for subrogation of monies paid to [her] employees." *Id.* To grant priority to the ICA's claim, the BAP concluded, would be unfair to the private insurers who compete with the state to provide insurance, but who

must "suffer along with the rest of the unsecured creditors" in bankruptcy. *Id.* The ICA timely appealed. We have jurisdiction under 28 U.S.C. §§ 158(c)(2) and 158(d).

LEGAL ANALYSIS

Under this circuit's leading decision in *In re Lorber Industries of California, Inc.*, 675 F.2d 1062 (9th Cir. 1982), an obligation owed to the state qualifies for priority as a "tax" under federal bankruptcy law only if it meets four separate requirements, three of which are not seriously disputed in this case. There is little or no question that the obligation was first, imposed by or under the authority of the legislature; second, for a public purpose; and third, imposed under the police power of the state in order to protect injured employees. The *Lorber* element about which the judges below disagreed in this case was whether the debt is an "involuntary" burden. In *Lorber*, the debtor owed the local sewer district charges for the debtor's use of the sewer system to discharge industrial waste. In holding that the obligation was contractual in nature rather than "involuntary," we stressed in *Lorber* that the obligation itself was not created by the statute authorizing imposition of the fees. *Id.* at 1067. Rather, the obligation was created by the debtor's voluntary act of using the system. *See id.* at 1067, n. 4.

Here, Camilli contends that her obligation is materially similar to that in *Lorber*, and the BAP majority agreed, holding that it was Camilli's "voluntary" decision not to purchase insurance that gave rise to this obligation. This holding is not, however, an accurate description of the legal effect of Camilli's failure to procure workers'

compensation insurance in Arizona, even if that failure could be considered to be a "voluntary" act. The source of Camilli's obligation to repay the workers' compensation benefits in this case was not her failure to obtain insurance, but the statutorily-created obligation to reimburse the Special Fund once the Fund paid benefits to an uninsured employee. By contrast, in *Lorber* the event that triggered the charges was the voluntary use by the debtor of the sewer system. The obligation to repay the Fund in this case is thus the product of legislative fiat; at the time it arose, and the lien was established, it was wholly beyond the control of the debtor.

Moreover, we conclude that the failure of an employer to comply with the Arizona's Workers' Compensation Law should not be considered a "voluntary" act giving rise only to an implied contractual obligation like the obligation to pay sewer charges in *Lorber.* The legal duty to provide workers' compensation insurance for employees in Arizona is part of a complex system designed not merely to offset state expenditures, but to provide universal availability of workers' compensation benefits to employees in the state. We therefore hold that Camilli's obligation to the Special Fund meets the *Lorber* elements for qualifying as a "tax" under federal bankruptcy law.

Because we held in *Lorber* that the sewer user charges were not entitled to priority as a tax, we did not have occasion to consider whether the elements we discussed in that case would, in all circumstances, be sufficient to qualify an obligation as a tax. We did not decide whether they were merely necessary elements that, even if satisfied, might not be sufficient to qualify an obligation for

priority. That issue has been addressed in subsequent decisions of the Sixth Circuit, handed down in the workers' compensation context, which we find instructive. *In re Suburban Motor Freight, Inc.*, 36 F.3d 484 (6th Cir. 1994) (*Suburban II*); *In re Suburban Motor Freight, Inc.*, 998 F.2d 338 (6th Cir. 1993) (*Suburban I*). The Sixth Circuit in these decisions concluded that the *Lorber* elements, if considered both necessary and sufficient to qualify an obligation as a "tax," would result in too many priorities of debts to the government over like claims of private creditors. The Sixth Circuit held that government entities should not be treated more favorably than private creditors with similar claims. *See Suburban II* at 488; *Suburban I* at 342.

In *Suburban I*, the Sixth Circuit considered the obligation of the debtor to pay premiums to the Ohio Bureau of Workers' Compensation. Under the Ohio workers' compensation scheme, unlike the Arizona workers' compensation scheme, all employers were required to pay premiums to the State Bureau of Workers' Compensation, and private insurance companies were not permitted to offer workers' compensation insurance. Central to the court's holding that the premium obligation was a "tax" was the fact that employers could have no similar obligations to a private carrier. Taking the view that the "public purpose" element enunciated in *Lorber*, standing alone, reached too broadly, the court refined *Lorber's* "public purpose" criterion to require (1) that the pecuniary obligation be universally applicable to similarly situated entities; and (2) that according priority treatment to a government claim not disadvantage private creditors with like claims. *See Suburban I*, 998 F.2d at 342. Because

the premium obligation to the state was, in Ohio, a universal obligation for all employers except self-insurers, and because according priority treatment to those claims did not disadvantage any private creditors with similar claims, *Suburban I* held that the premium obligations were a tax.

In *Suburban II*, however, the same court was faced with the Bureau's claim, not for premiums, but for reimbursement of payments made to workers' compensation claimants. The payments had been necessitated by Suburban's failure to pay premiums when it was a participant in the state insurance fund, and its failure to pay claims which arose when it was a self-insured employer. The Sixth Circuit decided that such claims for reimbursement did *not* qualify as a "tax" within the meaning of the Bankruptcy Code.

Suburban II dealt first with the state's claim for reimbursement of compensation payments it made when the debtor was a fund participant but had defaulted on its premium obligations. The court reasoned that, once it had held in *Suburban I* that the premium obligations themselves were entitled to priority as a tax, the court would not accord priority to the Bureau's claim for reimbursement as well. The Sixth Circuit concluded that allowing priority in bankruptcy for both premiums and claims payments would overcompensate the state without benefitting the general public.

Suburban II also dealt with claims for reimbursement brought about by Suburban's default on obligations to employees during the period when it was a declared self-insurer under the Ohio law. Again, relying on the specific

provisions of Ohio law, the court noted that Ohio law required self-insurers to post a bond, and that sureties had contributed, along with the state's surplus fund, to compensate Suburban's injured employees when Suburban defaulted. To allow priority status to the state fund, the court concluded, would be unfair to private sureties.

The ICA's claims in this case are materially different from the Bureau's in *Suburban II*. First, the Arizona's workers' compensation scheme is not a state monopoly, so that premium obligations to the state would not be accorded tax priority as a universal obligation of all insured employers. Second, the ICA's Special Fund differs from Ohio's in that the ICA carries its statutorily-imposed burden alone. No private entity competes with the ICA to pay "insurance" claims for which no insurance has been bought. Thus, there are no private creditors with claims similar to the ICA's in bankruptcy proceedings.

Accordingly, the Sixth Circuit's decisions in *Suburban I* and *Suburban II* are fully consistent with our holding that the exclusive and universal obligation under Arizona law of the Special Fund to provide compensation to employees of uninsured employers is a "tax" entitled to priority under the Bankruptcy Code. Because the obligation in this case meets the four additional requirements set forth by the Sixth Circuit in *Suburban I*, as well as the criteria of *Lorber*, there is no need to decide whether the *Suburban I* requirements must be met in all cases.

Cases in other jurisdictions are also consistent with our decision today. The cases out of states like Ohio, where workers' compensation insurance by the state is mandatory, and the state insurance system monopolistic,

generally hold that premium obligations to the state scheme have priority "tax" status. *See, e.g., New Neighborhoods v. W. Va. Workers' Compensation Fund,* 886 F.2d 714 (4th Cir. 1989); *In re Pan American Paper Mills, Inc.,* 618 F.2d 159, 162 (1st Cir. 1980); *In re E.A. Nord Co., Inc.,* 75 B.R. 634 (Bankr. W.D. Wash. 1987); *In re Int'l Automated Mach., Inc.,* 9 B.R. 575 (Bankr. N.D. Ohio 1981). Similarly, courts have given tax priority to mandatory "contributions" to state workers' or unemployment compensation funds. *See, e.g., Matter of Pierce,* 935 F.2d 709, 711 (5th Cir. 1991); *In re William Akers, Jr. Co.,* 121 F.2d 846 (3rd Cir. 1941); *In re Nail,* 163 B.R. 105 (Bankr. E.D. Mich. 1994); *In re Chateaugay Corp.,* 153 B.R. 632 (Bankr. S.D.N.Y. 1993); *In re Continental Minerals Corp.,* 132 B.R. 757, 759 (Bankr. D. Nev. 1991); *In re Ndosi,* 116 B.R. 687, 689 n. 1 (Bankr. D. Minn. 1990).

For the foregoing reasons the decision of the Bankruptcy Appellate Panel is REVERSED and the matter is remanded with instructions to affirm the decision of the Bankruptcy Court.

REVERSED and REMANDED

APPENDIX B

In re Karen Lee CAMILLI, Debtor.

Karen Lee CAMILLI, Appellant,

v.

INDUSTRIAL COMMISSION OF ARIZONA, Appellee.

BAP No. AZ-93-2437-JMeR.
Bankruptcy No. 92-14706-PHX-RTB.
Adv. No. 93-517.
United States Bankruptcy Appellate Panel of the Ninth Circuit.

Argued and Submitted Sept. 28, 1994.

Decided April 27, 1995.

Russell A. Brown, Chandler, AZ, for appellant.

Lawrence D. Hirsch, Phoenix, AZ, for appellee.

Before JONES, MEYERS and RUSSELL, Bankruptcy Judges.

OPINION

MEYERS, Bankruptcy Judge:

I

The bankruptcy court held that a state agency's claim for reimbursement of workers' compensation benefits paid to the debtor's employee was nondischargeable as an excise tax.

We **REVERSE.**

II

FACTS

Karen Camilli ("Camilli") owned a janitorial business in Arizona called Final Touch. Arizona law required Camilli to provide workers' compensation benefits for her employees, using either State provided insurance, private insurance or appropriate self-insurance. Ariz.Rev.Stat.Ann. ("A.R.S.") § 23-961. On November 26, 1989, Barbara Kennedy ("Kennedy"), an employee of Final Touch, was injured at work. At that time, Final Touch did not have workers' compensation insurance.

Under Arizona law, an employer who fails to procure workers' compensation insurance can be held liable to an injured worker in a legal action. A.R.S. § 23-907.A. The injured worker may either file a civil action against the employer or apply for compensation benefits with the Industrial Commission of Arizona ("ICA"). A.R.S. § 23-907.B. Payments of these benefits "act as a judgment against the employer." A.R.S. § 23-907.C.

Kennedy filed a claim for compensation with the ICA. The ICA awarded Kennedy $14,543.55 in compensation, plus $1,454.36 as a statutory penalty. The total award of $15,997.91 was then filed in superior court as a judgment against Camilli.

On February 6, 1991, Camilli filed a voluntary petition for relief under Chapter 13 of the Bankruptcy Code. The ICA filed a proof of claim in the bankruptcy case, asserting that its claim was entitled to priority status as an excise tax pursuant to 11 U.S.C. § 507(a)(7)(E)(ii). The ICA also objected to confirmation of Camilli's Chapter 13

plan. After briefing and oral argument by both parties, the bankruptcy court took the matters under advisement. The Chapter 13 case was dismissed before the court issued a decision.

Seven months later, on December 10, 1992, Camilli filed a Chapter 7 petition. She subsequently filed a complaint alleging that the debt owed to the ICA was dischargeable because it was not an excise tax. After the ICA filed a response to the complaint, the parties stipulated to submit the issue to the trial court based upon the oral argument and pleadings filed in Camilli's prior Chapter 13 case.

The bankruptcy court issued an order on November 12, 1993, finding that the principal amount paid by the ICA was a nondischargeable tax, but that the penalties, attorney's fees and costs assessed by the ICA were dischargeable. A judgment was entered on December 15, 1993, providing that the sum of $43,237.81, was excepted from the discharge. This amount represents the principal amount of medical and compensation benefits which the ICA had paid to Kennedy through January 4, 1993. Camilli filed an appeal.

III

STANDARD OF REVIEW

Because the facts in this appeal are undisputed, the appeal involves only legal issues which are subject to *de novo* review. *In re Conco Bldg. Supplies, Inc.*, 102 B.R. 190, 191 (9th Cir. BAP 1989).

IV

DISCUSSION

Section 523(a)(1)(A) of the Bankruptcy Code excepts from discharge debts for taxes entitled to priority under Section 507(a)(2) and (a)(7). The ICA contends that its claim is nondischargeable because it is entitled to priority under Section 507(a)(7)(E)(ii) as an excise tax. Camilli disputes the ICA's characterization of its claim as an excise tax.

Everyone generally has preconceived notions of what a tax is. Under the proverbial "duck test," anything that looks like a tax, walks like a tax and quacks like a tax is a tax. *See City of Jackson v. Pittman*, 484 So.2d 998, 1000 (Miss.1986). A claim for reimbursement of funds paid to injured workers does not "quack like a tax" and traditionally would not be thought of as a tax. Yet we are not free to use this simple test. Courts must view the term "tax" as embedded in legal contexts from which the word gains concrete and specific meaning. *Brock v. Washington Metropolitan Area Transit Auth.*, 796 F.2d 481, 489 (D.C.Cir.1986). Characterization of a payment as a "tax" in certain contexts has no talismanic significance, especially when the term is applied to an elaborate statutory scheme such as that created by the Bankruptcy Code. *See Union Pacific R. Co. v. Public Utility Com'n*, 899 F.2d 854, 861 (9th Cir.1990). We look to federal law to determine whether a debt is a tax entitled to priority in bankruptcy. *New York v. Feiring*, 313 U.S. 283, 285, 61 S.Ct. 1028, 1029, 85 L.Ed. 1333 (1941).

The issue of whether charges incurred under a state's workers' compensation scheme should be viewed as taxes

is a difficult one, generating a diversity of decisions which, on the whole, may do more to confuse the issue than to clarify it.[1] Even the court in the leading case of *In re Lorber* Industries of California, Inc., 675 F.2d 1062, 1067 (9th Cir.1982), admitted that determining whether assessments are fees or taxes can be "a close question." The distinction between a fee and a tax in this case also is a close question. The Ninth Circuit's analysis in the *Lorber* case, as additionally developed by the Sixth Circuit, leads us to conclude that the claim for reimbursement is dischargeable.

Lorber adopted the list of four factors describing a tax in the context of bankruptcy law, which was first set forth

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[1] *See, e.g., In re Suburban Motor Freight, Inc.*, 998 F.2d 338 (6th Cir.1993) (*"Suburban I"*) (premiums owed to the State for workers' compensation insurance entitled to priority as excise taxes); *New Neighborhoods v. W.Va. Workers' Comp. Fund*, 886 F.2d 714 (4th Cir.1989) (same); *Pan American Papers Mills, Inc.*, 618 F.2d 159 (1st Cir.1980) (same); *In re Chateaugay Corp.*, 153 B.R. 632 (S.N.Y.1993) (state claims for unpaid workers' compensation premiums entitled to priority; state claims for reimbursement of funds paid to injured employee of uninsured employer not entitled to priority as excise taxes); *In re Hutchinson*, 135 B.R. 890 (Ariz.1992) (claim for reimbursement of funds paid to injured employee entitled to priority as excise tax); *In re Metro Transp. Co.*, 117 B.R. 143 (E.Pa.1990) (premiums owed to the State for workers' compensation insurance not entitled to priority as excise tax); *In re E.A. Nord Co., Inc.*, 75 B.R. 634 (W.Wash.1987) (premiums owed to the State for workers' compensation insurance entitled to priority as excise tax); *In re Payne*, 27 B.R. 809 (Kan.1983) (claim for reimbursement of funds paid to injured employee was dischargeable fee rather than nondischargeable excise tax); *In re Beaman*, 9 B.R. 539 (Or.1980) (claim for reimbursement of funds paid to injured employee was nondischargeable excise tax).

in *In re Farmers Frozen Food Company*, 221 F.Supp. 385, 387 (N.D.Cal.1963), *aff'd without opinion*, 332 F.2d 793 (9th Cir.1964). An exaction of a tax is characterized as:

(a) An involuntary pecuniary burden, regardless of name, laid upon individuals or property;

(b) Imposed by, or under authority of the legislature;

(c) For public purposes, including the purposes of defraying expenses of government or undertakings authorized by it;

(d) Under the police or taxing power of the state.

Lorber, supra, 675 F.2d at 1066. On its face, this list is broad and has the potential to include any and all sovereign undertakings. *Suburban I, supra*, 998 F.2d at 341-42; *Payne, supra*, 27 B.R. at 814. However, after listing the factors, the court in *Lorber* expounded on them and found that the sovereign undertaking at issue was not a tax. *Lorber, supra*, 675 F.2d at 1066-1068. Although the *Lorber* case concerned the Bankruptcy Act, the analysis in *Lorber* has continuing viability for cases brought under the Bankruptcy Code. *Hutchinson, supra*, 135 B.R. at 891. *See In re George*, 95 B.R. 718, 720 (9th Cir. BAP 1989) (applying *Lorber* to a case under the Bankruptcy Code), *aff'd without opinion*, 905 F.2d 1540 (9th Cir.1990).

The first element of a tax set forth in *Lorber* is "[a]n involuntary pecuniary burden, regardless of name, laid upon individuals or property." The court explained that while debts are voluntary obligations based on express or implied contracts, taxes are noncontractual obligations levied without the consent or voluntary action of the taxpayer. 675 F.2d at 1066.

The court in *Lorber* examined an ordinance which allowed a water district to assess surcharges only when district services were used by industrial customers and only in an amount proportionate to their use. The court noted that imposition of these charges was triggered by the debtor's decision to discharge industrial wastewater. Because the assessment resulted from the debtor's acts, the court found that it was not a tax. 675 F.2d at 1067. Rather, the amounts specifically charged for those services were by nature a debt obligation, based on a contractual agreement, the application for and issuance of a permit. *Id.*

In this case, Camilli had the choice of using self-insurance or private insurance instead of the state system of workers' compensation. The Bankruptcy Code generally does not give priority to claims resulting from injuries suffered by a debtor's employee. *See Chateaugay Corp., supra,* 153 B.R. at 635 ("The states agree that workers' compensation claims arising out of pre-petition injuries are ordinarily entitled to general unsecured status."). If a private insurer had paid Kennedy's claim, the debtor would have had no obligation to reimburse the insurer for the claim and the insurer's claim for any insurance premiums owed would not be given priority in bankruptcy. The payments to Kennedy by the ICA resulted from Camilli's voluntary decision not to provide insurance, and therefore the ICA's assessment should be regarded as a fee.

In sum, under *Lorber,* assessments stemming from a debtor's decision to use specific services provided by the State are dischargeable as fees. Because in Arizona an employer may elect not to use insurance provided by the

State, charges assessed by the State are in the nature of fees rather than taxes.

The ICA points out that once Camilli decided not to provide either private insurance or proper self-insurance, Arizona law required her to reimburse the ICA for benefits paid to Kennedy. The ICA maintains that the levy was therefore in the nature of an involuntary tax. This reasoning conflicts with that in *Lorber*. The *Lorber* court rejected the water district's argument that because it had statutory authority to impose charges on entities who had not acquired a permit prior to use, the source of the charge was statutory rather than contractual. *Lorber, supra,* 675 F.2d at 1067 n. 4. The court in *Lorber* stated:

> [I]t would appear that imposition of charges on non-permit users would not transform the charges into taxes. The non-permit user who discharges into the system also incurs a debt obligation, based on an implied contract. The source of the obligation is not the statute authorizing imposition of charges, but the non-permit user's voluntary act of using the system.

Id. The water district's authority in *Lorber* is analogous to that of the ICA in the instant case, in which the ICA imposed charges on Camilli after she failed to obtain insurance. Here, the ICA's claim arose only because Camilli chose not to obtain alternative insurance. The claim should be considered to stem from the ICA's implied voluntary contract with Camilli for subrogation of monies paid to Camilli's employees. *See Payne, supra,* 27 B.R. at 817.

It may seem unfair to allow Camilli to discharge her debt to the ICA, since she violated Arizona law by failing

to obtain insurance. However, Section 523 does not make every debt incurred in connection with a violation of state statute nondischargeable.

The *Lorber* case differs somewhat from the case at hand in that it involved charges for emitting waste and was brought under the former Bankruptcy Act. The issue presented and statutory authority applied in *In re Suburban Motor Freight, Inc.*, 36 F.3d 484 (6th Cir.1994) (*"Suburban II"*), are virtually the same as those in the instant case. *Suburban II* is the only circuit court case concerning whether a State's claim for reimbursement of funds paid to injured workers should be characterized as a tax under the Bankruptcy Code. We should "give most respectful consideration to the decisions of the other courts of appeals and follow them whenever we can." *Colby v. J.C. Penney Co., Inc.*, 811 F.2d 1119, 1123 (7th Cir.1987). Absent a decision by our Court of Appeals or a conflict between circuits, the Panel should regard the authority of another circuit as highly persuasive. *See Onyebuchim Onyeanusi v. Pan American World Airways*, 767 F.Supp. 654, 655 n. 1 (E.D.Pa.1990), *aff'd*, 952 F.2d 788 (3rd Cir.1992).

Citing and elaborating on *Lorber*, the court in *Suburban II* held that the claim was not a tax, but merely a dischargeable fee. It noted that if the debtor had used private insurance, it would not have incurred any additional liability for reimbursement for claims payments made on its behalf. 36 F.3d at 489. The court held that it would be unfair to give priority status to the State's surplus fund while letting unpaid private insurers suffer along with the rest of the unsecured creditors. *Id.* We find the Sixth Circuit's approach sound in refusing to elevate

what is essentially an insurance subrogation claim to tax priority status.

V

CONCLUSION

We view the levy at issue to be in the nature of a fee rather than a tax, and therefore **REVERSE**.

JONES, Bankruptcy Judge, dissenting:

All fifty states have enacted some form of mandatory workers' compensation scheme, which requires an employer to provide workers' compensation insurance for its employees. *Chateaugay I*, 153 B.R. at 634. With regard to how employers may obtain this insurance, there are two general variations. Some state systems require the employer to purchase insurance directly from the state. *See Payne*, 27 B.R. at 815. Other states, however, allow the employer to purchase the required coverage from private sources, including bonded self-insurance and private commercial insurance companies. *See Chateaugay I*, 153 B.R. at 638-39.

The Special Fund of the ICA is mandated by Arizona statue[1] to provide compensation benefits to injured employees whose employers violated state law by failing to provide workers' compensation coverage. The Arizona scheme directs the ICA to collect reimbursement from delinquent employers for the monies expended by the Special Fund to provide benefits for those injured employees.

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[1] A.R.S. §§ 23-907 and 23-1065.

In contrast to the Special Fund, no private insurers are obligated to pay benefits on behalf of the injured workers of uninsured employers. Thus, competing reimbursement claims by private insurers are highly improbable, if not inconceivable. If an unpaid reimbursement claim constitutes an "excise tax" as a matter of bankruptcy law, the claim is nondischargeable in an individual's bankruptcy. *New Neighborhoods,* 886 F.2d at 719. The Ninth Circuit has found that the characterization of an obligation as a "tax" in the unique context of an elaborate statutory scheme, such as that created by the Bankruptcy Code, will generally not be extended to non-bankruptcy cases. *See e.g., Union Pacific Railroad Company v. Public Utility Commission of Oregon,* 899 F.2d 854 (9th Cir.1990) (refusing to apply *Lorber* test to non-bankruptcy issue at hand) (citing *Massachusetts v. United States,* 435 U.S. 444, 460 n. 18, 98 S.Ct. 1153, 1163-64 n. 18, 55 L.Ed.2d 403 (1978)).

Although "excise tax" is not defined in the Bankruptcy Code, it was defined by the United States Supreme Court as a "pecuniary obligation laid upon individuals or their property, regardless of their consent, for purposes of defraying the expenses of government or undertakings authorized by it." *Feiring,* 313 U.S. at 285, 61 S.Ct. at 1029. In *Lorber,* the Ninth Circuit identified four factors for evaluating whether a payment to a government agency is a tax under federal law. A tax is: (1) an involuntary pecuniary burden imposed on individuals or property; (2) imposed by, or under the authority of, the legislature; (3) for public purposes such as for defraying expenses of government or governmental undertakings; (4) imposed under the police or taxing power of the state. *Id.* at 1066.

Although the *Lorber* test was developed under the former Bankruptcy Act, it has subsequently been applied in cases under the Bankruptcy Code, indicating its continued viability. *George*, 95 B.R. at 720.

1. Initial "Fee" vs. "Tax" distinction: Reimbursement Claims Are Not "Fees" Under the *Lorber* Rationale

While the majority contends that reimbursement claims constitute "fees" under the Ninth Circuit's *Lorber* rationale, such a holding is contrary to the vast majority of case law addressing this issue. *Payne*, 27 B.R. at 813-14 (explicitly rejecting argument that assessments and reimbursement claims were "fees" under *Lorber* rationale); *E.A. Nord Co.*, 75 B.R. at 636-37 (finding that Washington state assessment was a "tax" and not a "fee" under *Lorber* rationale); *see also Suburban II*, 36 F.3d at 488 (criticizing *Lorber* test as lenient, but finding reimbursement claim satisfied Ninth Circuit's *Lorber* definition of "excise tax"); *In re Chateaugay*, 177 B.R. 176, 182-85 (S.D.N.Y.1995) ("*Chateaugay II*") (finding reimbursement claims satisfied *Lorber* test, denying priority status under § 507(d)); *Chateaugay I*, 153 B.R. at 638-41 (finding that reimbursement claims satisfied *Lorber* test, denying priority status based on *Payne* "non-tax characteristics" factor); *Hutchinson*, 135 B.R. at 891 (holding ICA reimbursement claims are "excise taxes" under *Lorber* test).

The *Chateaugay I* court expressly rejected the argument that premium assessment claims and reimbursement claims were "fees" under the *Lorber* rationale. *Chateaugay I*, 153 B.R. at 638-39; see also E.A. Nord 75 B.R. at 636-37. The *Lorber* court found that a sewer surcharge

was a fee since it was "for services provided to the industrial users of the system . . . rather than to the general local population." *Lorber*, 675 F.2d at 1067. While a tax is an exaction for a public purpose, a fee relates to an individual privilege or benefit to the payer. *Chateaugay I*, 153 B.R. at 638. Premium assessment claims and reimbursement claims are not fees which confer a benefit on the employer separate from the benefit to the general public. *Id.* These assessments are for the public purpose of creating a fund to pay workers' compensation claims, thus, benefitting the general public who does not have to support the claimant employee. *Id.* (citing *Suburban Motors*, 134 B.R. 617, 624 (Bankr.S.D.Ohio 1991)); *Chateaugay II*, 177 B.R. at 184.

2. Purely "Public" Schemes: In Systems Where Employers Lack a Private Insurance Option a Direct Workers' Compensation Assessment by the State Against an Employer is an Excise Tax in Bankruptcy

The prevailing rule is that under a workers' compensation scheme where employers are directly assessed by the state, the direct assessment is an "excise tax" in bankruptcy. *Chateaugay I*, 153 B.R. at 639; *Payne*, 27 B.R. at 815. An early line of cases held that such assessments were not for public purposes, but were instead for the benefit of a discrete class, and thus were not taxes. *Id.* (citing *In re Farrell*, 211 F. 212 (W.D.Wash.1914)); *In re Eureka Paper Co.*, 44 Am.Bankr.Rep. 179 (N.D.N.Y.1919); *In re Rockaway Soda Water Mfg. Co.*, 36 Am.Bankr.Rep. 640, 226 F. 520 (E.D.N.Y.1915). However, that rationale has been criticized and rejected. *See Pan American Paper*, 618 F.2d at 162, n. 3; *Ernst v. Hingeley*, 11 Wash.2d 171, 118

P.2d 795 (1941); *C.S. Barlow & Sons v. H & B Lumber Co.*, 153 Wash. 565, 575, 280 P. 88, 91 (1929).

As noted above, the "public purpose" of workers' compensation systems is to compensate those employees who might otherwise require public support if their common law tort claims could not be successfully asserted. *New Neighborhoods*, 886 F.2d at 718-19; *accord Chateaugay II*, 177 B.R. at 184; *In re Hutchinson*, 135 B.R. 890 (Bkrtcy.D.Ariz.1992); *E.A. Nord*, 75 B.R. at 636. Although this purpose may also be regarded as a funding mechanism for a specific state undertaking, that does not diminish the public purpose that these systems serve. *New Neighborhoods*, 886 F.2d at 719. Furthermore, the punitive and contingent nature of such a tax does not detract from its character as an excise tax. *Beaman*, 9 B.R. at 542.

3. First *Lorber* Factor – "Involuntary" Pecuniary Obligation: Courts are Split in Jurisdictions Where *Private* Workers' Compensation Insurance is Allowed

To qualify as an excise tax under the *Lorber* factors, the pecuniary obligation at issue must be "involuntary."[2] In *Chateaugay I* and *Chateaugay II* the courts recognized that the availability of a "private" insurance option in a

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[2] In the instant case, Camilli argues that since her decision not to carry workers' compensation insurance (a statutory violation) was voluntary, this element of the *Lorber* test is not satisfied. This argument has been rejected by other courts and is without merit. *Beaman*, 9 B.R. at 541 ("[n]either compliance with the law nor payment of the tax imposed is elective once benefits are paid to an injured worker"); *see also Williams v. Motley*, 925 F.2d 741, 744 (4th Cir.1991).

statutory scheme does not affect the involuntary nature of the underlying obligation to provide workers' compensation insurance. *Chateaugay II*, 177 B.R. at 183-84; *Chateaugay I*, 153 B.R. at 639; *accord Payne*, 27 B.R. at 814. Also, in *New Neighborhoods*, the state's workers' compensation system allowed a private source, bonded self-insurance. *New Neighborhoods*, 886 F.2d at 716. Notwithstanding that a private source was allowed, the Fourth Circuit held that the state's premium claims were involuntary "excise taxes" since employers were compelled to participate in the system whether they paid into the fund or carried substitute insurance. *New Neighborhoods*, 886 F.2d at 719.[3]

Finally, a primary concern voiced by the Sixth Circuit in *Suburban I* and *Suburban II*, was that where a state scheme allows private insurance it would be unfair to consider state claims "taxes" while the competing claims of unpaid private insurers would be treated as general and unsecured. *Suburban I*, 998 F.2d at 342; *Suburban II*, 36 F.3d at 488-89. However, while such a concern may exist with regard to state premium assessment claims, the same danger is not applicable in considering the narrow

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[3] To limit the class of claims afforded priority status under the *Lorber* rationale, some courts deny priority status where a state's scheme allows for private insurance. *See Suburban I*, 998 F.2d at 342 (suggesting that if a state allowed employers to purchase private insurance it would be unfair to call state-collected premiums "taxes" while treating unpaid private insurance premiums as general unsecured claims); *Suburban Motor II*, 36 F.3d at 488 (finding that by allowing private sources, including bonded self-insurance, the "public welfare" becomes less dependent on the financial soundness of the state system); *Metro Transp. Co.*, 117 B.R. at 154.

issue of reimbursement claims since there are no private insurers competing with the Special Fund to pay benefits on behalf of the injured employees of uninsured employers.

4. Reimbursement Claims

Where a state pays benefits on behalf of the injured employee of an uninsured employer, courts are split as to whether a state's claim for reimbursement is an excise tax entitled to priority treatment in bankruptcy. Courts that reach the narrow reimbursement issue generally agree that both the obligation to carry insurance and the obligation to reimburse a state's special fund satisfy the Ninth Circuit's *Lorber* factors. *In re Payne*, 27 B.R. at 814; *Hutchinson*, 135 B.R. at 891; *Beaman*, 9 B.R. at 542; *Chateaugay II*, 177 B.R. at 182-84; *Chateaugay I*, 153 B.R. at 637-41; *see also Suburban II*, 36 F.3d at 488-89.

In *Suburban II*, the Sixth Circuit found that reimbursement claims satisfied the *Lorber* definition of "excise taxes." See *Suburban II*, 36 F.3d at 488. However, the *Suburban II* court criticized the *Lorber* factors as being too permissive[4] and added two criteria to the Ninth Circuit test that are intended to restrict the "public purpose" prong.[5] The *Suburban II* court found that a state's

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[4] *Suburban II*, 36 F.3d at 488 (citing *Suburban I*, 998 F.2d at 341).

[5] These two additional factors are: (1) that the pecuniary obligation be universally applicable to similarly situated entities; and (2) that according priority treatment to the government does not disadvantage private creditors with like claims. *Suburban II*, 36 F.3d at 488.

reimbursement claim did not satisfy these two additional criteria and denied priority status. *Id.* at 489. Other courts have denied priority status to reimbursement claims under Section 507(d) or by adding a step to the *Lorber* analysis comparing the "tax" and "non-tax" characteristics of the claim. *See e.g. Chateaugay II*, 177 B.R. at 184-85 (denying priority under § 507(d)); *Payne*, 27 B.R. at 816-17 (comparing tax and non-tax characteristics); *accord Chateaugay I*, 153 B.R. at 641. In application, additional criteria do not appear to clarify the *Lorber* analysis, and may in fact merely add to the confusion in this problematic area.

In contrast, bankruptcy courts in the Ninth Circuit have applied the *Lorber* analysis and found that the reimbursement claims of special funds are nondischargeable excise taxes in bankruptcy. *Beaman*, 9 B.R. at 542; *Hutchinson*, 135 B.R. at 891. The *Beaman* court held that a reimbursement claim was a nondischargeable excise tax imposed upon those who occupy the status of employers who have not obtained insurance required by law. *Beaman*, 9 B.R. at 542. In *Hutchinson*, the bankruptcy court held that the ICA's reimbursement claim received Section 507(a)(7)(E) tax priority since the reimbursement obligation was mandatory and served an important governmental interest. *Hutchinson*, 135 B.R. at 891.

In the instant case, the *Lorber* factors are satisfied. Furthermore, no private creditors compete with the state to provide benefits for the injured employees of uninsured employers. Thus, notwithstanding the concerns expressed by the Sixth Circuit in *Suburban I* and *Suburban II*, there are no similarly situated private creditors to be

prejudiced. Also, reimbursement claims are assessed universally against the delinquent employers of injured workers according to Arizona's statutory scheme.

Although under the *Lorber* standard many government claims may be "excise taxes" for purposes of Section 507(a)(7), that result in the instant case is consistent with the purpose of Congress in providing for priorities in bankruptcy. *See New Neighborhoods,* 886 F.2d at 720 (citing *Feiring,* 313 U.S. at 285, 61 S.Ct. at 1029). To hold otherwise with respect to reimbursement claims would benefit only that class of delinquent employers who fail to obtain worker's compensation insurance in violation of state statute. Accordingly, I would **AFFIRM**.